United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7367

ORIGINAL

To be argued by
IRVING B. BUSHLOW

United States Court of Appeals

FOR THE SECOND CIRCUIT

VITO VALENTINO,

Plaintiff-Appellee,

against

RICKNERS RHEDEREI, G.M.B.H., SS ETHA,

Defendant,

and

JOHN W. McGRATH CORPORATION,

Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE

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Statement

In this appeal from a Memorandum Decision and Order of Judge Jack B. Weinstein (5a-21a), the employer, John W. McGrath Corporation, Intervenor-Appellant, asserts that its lien has priority over the attorney's fee awarded to plaintiff's attorney for his efforts in recovering a judgment against the defendant-shipowner. Plaintiff claims that Judge Weinstein's decision should be affirmed for the reasons stated in his decision and hereinafter argued.

Issue Presented

Should an attorney be entitled to a pro-rata allocation of his fee from a fund (judgment or settlement) created by the attorney's effort?

ARGUMENT

POINT I

Equity dictates that an attorney should be entitled to a pro-rata fee from a fund created by his efforts.

Plaintiff does not dispute McGrath's contention that it has a lien against the judgment recovered in this lawsuit. However, plaintiff does dispute McGrath's contention that its lien has priority over a fee awarded plaintiff's attorney for his effort in creating the very fund (judgment) from which McGrath wishes to be paid.

Prior to the 1972 Amendments, the usual course of longshoremen's litigation in the New York area was for the injured longshoreman to sue the shipowner who in turn attempted to recover from the stevedore-employer any amount recovered against the shipowner, plus attorneys fees, costs and disbursements. This procedure followed the rule of *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124 (1956) which granted a shipowner against whom a judgment had been recovered by a longshoreman, the right of indemnity against the stevedore-employer. Under the circumstances prevalent at that time most Courts denied recovery of attorney's fees under the circumstances herein.

However, the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act limited the grounds of recovery against the shipowner and elimi-

nated the right of indemnity. Now the injured longshoreman and his employer have a common interest in recovering a judgment against the shipowner. Under these circumstances Judge Weinstein evaluated the changed circumstances and equities and awarded plaintiff's attorney a pro-rata fee for his efforts in recovering a judgment against the negligent shipowner.

Furthermore, under the 1972 Amendments, if an injured longshoreman receives an award and does not commence an action against the shipowner, the employer or its insurance carrier may bring suit pursuant to 33 U.S.C. 933(b) and (h). If there is a recovery, distribution is made in accordance with 33 U.S.C. 933(e). Under that section the *first* payment or priority is to repay the employer the expenses of the lawsuit plus a reasonable attorneys fee. Then comes repayment of benefits paid (lien).

In a post 1972 Amendment case, the Fourth Circuit Court of Appeals dealt with the issues presented herein in *Swift* v. *Bolten*, 517 F.2d 368, 370 (4 Cir. 1975) and used both of the foregoing arguments in supporting its decision to award plaintiff's attorney a proportionate fee out of the lien recovered. The Court stated at 517 F.2d at p. 370:

> "Provided that pecuniary advantage is secured through the services of counsel employed by the longshoreman, the stevedore should be taxed with that part of a reasonable fee for the longshoreman's counsel as is proportioned to its share of the recovery. This is the rule that has been adopted in similar instances and that accords with settled equitable principles. See Vaughan v. Atkinson (1962) 369 U.S. 527, 530, 82 S.Ct. 997, 8 L.Ed.2d 88, reh. denied 370 U.S. 965, 82 S.Ct. 1578, 8 L.Ed.2d 834 (1962); Sheris v. Travelers Insurance Company

(4th Cir. 1974) 491 F.2d 603, 608, cert. denied 419 U.S. 831, 95 S.Ct. 54, 42 L.Ed.2d 56. In this case, as we have said, the fee is reasonable and the representation was effective. Accordingly, the longshoreman was entitled to have an apportionment of his attorney's fees between him and the stevedore or its insurance carrier in proportion to their share in the recovery had. After all, had the longshoreman not filed the action, the insurance carrier would have been forced to file an action to recover of the shipowner for its payments and would have incurred attorney's fees payable out of its recovery. It suffers no injury if it is forced, as we hold, to bear its proportionate share of the attorney's fees when the longshoreman files the action and makes full recovery on its behalf."

Swift cited with approval the Fifth Circuit case of *Chouest* v. *A. P. Boat Rentals, Inc.*, 472 F.2d 1026 (5 Cir. 1973), cert. den. 411 U.S. 983 (1973), where the Court awarded plaintiff's attorney a fee by proportionately taxing the stevedore's lien and the injured longshoreman's share of the judgment in an action where the employer was a third party defendant and represented by counsel. The issue presented there and in this action was summarized at 472 F.2d at p. 1032, f.n. 9:

"We see no reason why the subjective motivations of the employee's lawyer, or the pre-litigation fears and desires of the employer, should affect the distribution of the proceeds of a successful action against the shipowner. The significant question is whether the employer actually benefits from the employee's recovery, and whether he should reimburse the lawyer but for whose efforts a sizeable amount of money might not have come the employer's way. Whether an employer thinks or pre-

> dicts he may profit from an employee's suit against a shipowner, and whether the employee's lawyer is truly or sincerely acting on behalf of the employer when he initiates litigation for the employee have no proper place in the resolution of the problem before us."

Fontana v. *Pennsylvania R. Co.*, 106 F.Supp. 461, aff'd on opinion below, sub nom., 205 F.2d 151 (2 Cir. 1953), cert. den. 346 U.S. 886 (1953), relied on by McGrath actually supports plaintiff's pos. .on. In *Fontana*, there was a $4,000 settlement out of which plaintiff's attorney presumably received a fee. The stevedore intervened to recover its lien and plaintiff's attorney opposed the stevedore's application. Judge Weinfeld held that the stevedore had a lien, but that the attorney's fee should be deducted from the recovery first, before the lien, in accordance with 33 U.S.C. 933(e). See 106 F.Supp. 463-464:

> "Thus, the Act treats the recovery as a fund charged first with the expense of the litigation and then with the amounts paid for compensation and medical expenses and the employee becomes entitled only to any excess finally remaining. There is no reason why a recovery obtained against the third party by the employee rather than the employer should be distributed differently. The expense of securing the recovery is, as in equity it should be, a first charge against the fund itself. As such it is immaterial whether the fund was created in a suit brought by the employer or one brought by the employee."

The Court in *Chouset*, supra, in 472 F.2d at 1034, fn. 13, also read *Fontana* as holding that attorney's fees and litigation expenses should be deducted first from the gross recovery before compensation payments are repaid to the employer.

It is submitted that the above interpretation of *Fontana* is in accord with Judge Weinstein's decision and is also in accord with the equitable principle stated in *Ballwanz* v. *Jarka Corporation of Baltimore,* 382 F.2d 433, 435 (4 Cir. 1967):

> "It is well settled, of course, that lawyers, who successfully create or preserve a fund in the custody of the court for the benefit of a class, are entitled to reasonable compensation out of the fund."

McGrath also argues in its brief that since no benefit was conferred upon the plaintiff that his attorney should not recover a fee. This argument ignores the fact that plaintiff's attorney has conferred a benefit upon the stevedore or its carrier and should receive a fee for these services. In the Port of New York, it is not customary for stevedores to bring actions on behalf of injured longshoremen to recover benefits paid. The stevedores are content to sit back and allow the injured longshoremen to retain attorneys and bring their own actions and then the stevedore steps into the proceedings after there has been a recovery by settlement or judgment and demands repayment of its lien.

It is submitted that the equitable doctrine enunciated by Judge Weinstein fairly allows this type of litigation to proceed and properly awards a fee to plaintiff's attorney for recovery of the stevedore's lien. This Court should affirm Judge Weinstein's decision.

CONCLUSION

The decision below should be affirmed in all respects.

Respectfully submitted,

IRVING B. BUSHLOW
Attorney for Plaintiff-Appellee

375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VALENTINO

VS

XCA

RICKERS RHEDEREI

&

MC F GRATH

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NY , ss:

ROBERT FORD being duly sworn,

deposes and says that he is over the age of 21 years and resides at 755 Hancock st Bklyn NY

That on the 22nd day of December, 1976 19 at

he served the annexed brief on behalf of plaintiff-appellee upon

Mc Hugh Heckman, Smith & Leonard, 80 Pine Street, NY, NY

in this action, by delivering to and leaving with said attorneys

three true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 22nd day of December, 1976 19

Robert L. Ford

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977